IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INCOME TAX MATTER

ITA No. 142/2004

Decided on: September 21, 2007

COMMISSIONER OF INCOME TAX
DELHI-I, NEW DELHI ..... Appellant
Through Mr.J.R.Goel, Advocate

versus

SATISH KUMAR CHANDNA
A-4, GREATER KAILASH ENCLAVE,
PART – I, NEW DELHI ..... Respondent
Through Mr.C.S.Aggarwal, Senior Advocate
with Mr.Prakash Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE DR. JUSTICE S. MURALIDHAR

1. The Revenue is aggrieved by an order dated 24th November, 2003, passed by the Income Tax Appellate Tribunal (for short "the Tribunal") in IT(SS) No. 46/Del/97 relevant for the block period 1st April, 1985 to 22nd February,1996.

2. At the outset, learned counsel for the Assessee has drawn our attention to a decision of the Supreme Court in Homi Jehangir Gheesta Vs. Commissioner of Income-Tax, Bombay City, [1961] 41 ITR 135, to contend that the order passed by the Tribunal should not be examined sentence by sentence, through a microscope as it were, so as to discover a minor lapse here or an incautious opinion there to be used as a peg on which to hang an issue of law.

3. He has also drawn our attention to a decision of this Court in Mahavir Woollen Mills Vs. Commissioner of Income-Tax, [2000] 245 ITR 297, wherein this Court considered what is a substantial question of law. It was observed that a question of fact becomes a question of law if the findings are without any evidence or material or the finding is contrary to the evidence or perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. It was further held in that decision that even though the words "substantial question of law" have not been defined, usually five tests are accepted for determining whether a substantial question of law is involved. These five steps, as enumerated by this Court, are as under :-

"1. Whether, directly or indirectly, it affects substantial rights of the parties, or

2. the question is of general public importance, or

3. whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or Privy Council or by the Federal Court, or

4. the issue is not free from difficulty, and

5. it calls for a discussion for alternative view."

4. We have kept the above dictum in mind, with which there is, of course, no quarrel. We have also kept in mind that insofar as the present case is concerned, the order of the Tribunal is an order passed by the first appellate authority, since it arises out of a block assessment and is not an order passed by the second appellate authority. We emphasize this because the first appellate authority must consider all the facts of a case so that on a reading of its order, the facts and the conclusions are apparent. It should not be necessary for anybody to delve into the records of the case to find out how the mind of the first appellate authority worked in coming to the conclusions mentioned in the order. The reason for this is quite obvious: the first appellate authority is usually the final fact determining authority(other than in some taxing statutes) – a second appeal is usually maintainable only on a substantial question of law as in the present case. The power of the first appellate authority is co-extensive with that of the court (or authority) of first instance. In that sense, it is a 'court of error' and, therefore, the Tribunal in the present case, as the first appellate and final final fact determining authority ought to have examined all the evidence so that on a reading of its order, it is possible for us to know the conclusions of fact and the evidence on the basis of which they have been arrived at. It is only if this exercise is undertaken by the Tribunal that we can treat the factual conclusions arrived at by it as definite (subject to the exceptions mentioned in Mahavir Woollen Mills). Otherwise, despite our being the second appellate authority concerned only with substantial questions of law, we would be required to sift through the evidence to support or contradict factual conclusions arrived at by the Tribunal. Clearly, this cannot be our function or our jurisdiction.

5. On a perusal of material passages of the order passed by the Tribunal, we find that it is not possible to facially know the basis on which the Tribunal has reached some conclusions. It is necessary to go through various materials which learned counsel for the Assessee informs us are included in the written submissions filed by the Assessee before the Tribunal. We find this to be not only unsatisfactory but also impermissible.

6. In this view of the matter and keeping the above principles in mind, we admit this appeal and frame two questions of law, which we think take care of the entire controversy before us.

7. We may mention here that the Revenue has raised before us as many as ten questions of law but because of what we have stated above, we are framing only two questions of law since we are of the opinion that some of the other questions of law framed by the Revenue do not arise, and the questions of law framed by us take care of other issues that have been raised by the Revenue.

8. The two substantial questions of law are as follows :-

(i) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in law in deleting the addition of Rs. 19,45,000/- made by the Assessee on account of investment in property bearing number B-222, Okhla, New Delhi?

(ii) Whether the order passed by the Tribunal is perverse in law as it has been passed on the basis of estimates made by the Income Tax Appellate Tribunal without indicating the basis on which it has arrived at those estimated figures?

Filing of paper books is dispensed with.

9. The facts, insofar as the first question is concerned, are that the Assessing Officer had made a reference under Section 131 of the Income Tax Act, 1961 (for short "the Act") for ascertaining the cost of construction of the property in question to the Departmental Valuation Officer.

10. Before the Tribunal, reliance was placed by the Assessee on a decision of the Supreme Court in Smt. Amiya Bala Paul Vs. Commissioner of Income-Tax, [2003] 262 ITR 407 (and the Tribunal accepted the contention of learned counsel for the Assessee based on that decision) that a reference to a Departmental Valuation Officer could be made only for the purpose of Section 55-A and Section 269 of the Act and therefore, the reference was invalid and no cognizance could be taken of a valuation report prepared by the Departmental Valuation Officer.

11. On the other hand, learned counsel for the Revenue has drawn our attention to Section 142A of the Act which was inserted by Finance No. 2 Act, 2004 with retrospective effect from 15th November, 1972.

12. Obviously, the Tribunal did not have the benefit of the provisions of Section 142A of the Act since it came on the statute only after the order was passed by the Tribunal.

13. Now, since Section 142A of the Act has come into force with retrospective effect, we are of the view that it may have some material bearing on the issue that has been raised.

14. Learned counsel for the Assessee submits that the incorporation of Section 142A is of no consequence. He relied upon a decision of this Court in Commissioner of Income Tax Vs.Indo-Kenyan Industrial Enterprises, [2005] 197 CTR Reports 78, to contend that in similar circumstances this Court had declined to frame a substantial question of law. On a perusal of that decision, we find that there is no mention about the retrospective operation of Section 142A of the Act, which appears to have been overlooked by the Division Bench.

15. In any event, the retrospective incorporation of Section 142A of the Act is an issue that ought to be considered by the Tribunal. Therefore, while remitting the matter back to the Tribunal to reconsider the first issue before us, we make is clear that we are not expressing any opinion on the effect, if any, of Section 142A of the Act on the controversy in issue.

16. Insofar as the second substantial question of law is concerned, we find that there are several issues that were not adequately considered by the Tribunal. We may mention only four of them here, by way of example.

17. The first issue is concerned with the total turnover of the business carried on by the Assessee under the name of M/s Shri Ram Silk Mill, Ashu Textiles Traders and P.R. Trading Company. We were told that the Assessee was carrying on business under seven different names and the income in respect of four entities had been disclosed by the Assessee while in respect of the three above-mentioned entities, the income was not disclosed.

18. The Assessing Officer found that the Assessee did not maintain any account books and so, on the basis of the bank accounts maintained by the Assessee, he calculated the turnover of these three entities at Rs. 14.81 crores. Before the Tribunal, it was contended by learned counsel for the Assessee that certain amounts which had been credited but subsequently reversed due to return of goods and some credits reflecting transfer entries and credit involving sale consideration should be excluded from the total turnover. The Departmental Representative had no objection to this. The Assessee contended that on the basis of these deductions, the total turnover should be calculated as Rs. 10.24 crores. However, the Tribunal estimated the total turnover at Rs.11.50 crores. How the Tribunal has arrived at this figure is not very clear. Learned counsel for the Assessee took us through the paper book filed before the Tribunal, and that paper book makes a reference to something called the master paper book. What learned counsel for the Assessee tried to impress upon us was that the basis for the decision of the Tribunal could be found out from the paper book and master paper book. While this may be so, we have already indicated above that the Tribunal, being the first appellate authority should have discussed all the relevant material in its order so that we could know, on a bare reading of the order, the basis on which the Tribunal came to the conclusion that the total turnover of the Assessee is Rs. 11.50 crores as against Rs. 14.81 crores found by the Assessing Officer and Rs. 10.24 crores contended by learned counsel for the Assessee.

19. The unsatisfactory manner in which the Tribunal has dealt with the matter is best expressed in its own words :-
"56. As regards estimation of total turnover, we agree that the amount credited, which has been subsequently reversed due to return of goods, cannot be considered as turnover. Similarly, the credits in the bank account reflecting the transfer entries and credit not involving sale consideration should also be excluded from the turnover.

57. We find that the Assessing Officer had estimated the total turnover at Rs. 14.81 crores as against the assessee's estimation of Rs. 10.42 crores (should be Rs.10.24 crores). After perusing the bank account, we estimate the total turnover of the assessee from these three benami concerns at Rs. 11.50 crores." Parenthesis added

20. In the absence of any calculations having been given by the Tribunal despite being the first appellate authority, we are left wondering as to how the above figures have been arrived at.

21. The second issue relates to the net profit rate which has been estimated by the Tribunal at 0.6% on the turnover of Rs. 11.50 crores. Again, there appears to be no cogent basis for arriving at this estimate. Learned counsel for the Assessee contended that in respect of the concerns of the Assessee (presumably those concerns for which the income was disclosed) the net profit rate ranges between 0.30% to 0.80% over a period of time. The Tribunal merely adopted the average of the two extremes and then came to the estimate of 0.6% as the net profit rate on the turnover of Rs. 11.50 crores.

22. As already mentioned above, it is not evident how the Tribunal had come to the estimated turnover of Rs.11.50 crores and similarly, the basis for estimating the net profit rate at 0.6% is also not discernible. Even if the net profit rate is correctly arrived, the total addition would change when the total turnover changes.

23. The view expressed by the Tribunal is to be found in paragraph 59 of its order, which reads as follows :-

"59. We also find that the Assessing Officer has applied the net profit rate at 6% of the total turnover. We find that the assessee has been carrying on these activities in his own name as well as the various concerns of the assessee were also engaged in the same business. In these concerns, the net profit rate ranging between 0.30% to 0.80% have been declared. The same have been accepted even in the past. Keeping these facts in view, we adopt the average of the two and hold that the assessee has earned the net profit @ 0.6% on the turnover of Rs. 11.50 crores. On this basis, the profit from the benami business will come to Rs. 6.90 lakhs. The total addition under this head will, therefore, come to Rs. 12.90 lakhs. As the assessee has declared the undisclosed income at Rs. 8.50 lakhs on this account, the addition of Rs. 4.40 lakhs is confirmed and the balance addition is deleted."

24. The third issue concerns investments made by the Assessee in the three benami entities. The Tribunal has taken the investments to be Rs. 6 lakhs. This is again on an estimated basis and from a reading of the order of the Tribunal, particularly, paragraph 58 thereof, we are able to understand how this figure has been arrived at. Paragraph 58 of the Tribunal's order reads as follows :-

"58. Ld. counsel has also stated that no investment was made by the assessee in its benami concerns as the payment for the supplies were made by him after the sales were made by the assessee and the sale consideration was received. The Ld. Counsel had, therefore, pleaded that no addition was warranted on this account. But the details submissions of this account indicated that some capital was required for carrying on the business activities of the benami concerns. This may be during that in most of the times, the payment for supplies made to assessee have been made only after the receipt of sale consideration but there are various payments which could not be co-related with the sale consideration received by the assessee. On estimate basis, we hold that a sum of Rs. 6 lakhs had been employed by the assessee in carrying on the business activities in the name of these three benami concerns."

25. Fourthly, there appears to have been some lucky draw and expenses were incurred by the Assessee in conducting the lucky draw. The Assessing Officer had gone into the accounts in detail and had come to the conclusion that the income earned therefrom was to the tune of Rs. 9.78 lakhs but a sum of Rs. 3 lakhs was spent by the Assessee and another sum of Rs. 3 lakhs by the brother of the Assessee for organizing the events. But the Tribunal considered, in paragraph 64 of its order, the estimated income at Rs. 1 lakh and therefore, an addition of Rs. 50,000/- was made in the hands of the Assessee as undisclosed income. Again, there seems to be no reason at all for this estimate. This is what the Tribunal says in paragraph 64 of its order :-

"64. As regards income from lucky draw, we agree with the learned DR that the assessee was not doing any charity word in conducting a lucky draw. If the assessee along with his brother was operating the lucky draw regularly, it was not a case of self-service. The income from such lucky draw has to be treated as undisclosed income. However, we adopt the income from such activity at

Rs. 1 lakh and as the assessee was doing this business with his brother, the addition of Rs. 50,000/- only is confirmed in the hands of the assessee as undisclosed income. The addition of the balance amount is deleted."

26. We have mentioned these four matters only by way of examples to show that it is not possible to appreciate, from a bare reading of the order of the Tribunal, the basis on which it has come to certain conclusions. As already mentioned above, being the first appellate authority, and in this case also the final fact determining authority, we would have expected the Tribunal to at least give the basis for coming to these conclusions. Even though the conclusions are based on estimates, it is not necessary to know the basis on which the estimates are made. The estimates cannot be totally arbitrary. The Tribunal has not given the basis and, therefore, we have no alternative but to conclude that the findings of the Tribunal are perverse in law and to remand the matter back to the Tribunal for reconsideration of all these issues.

27. There is one further question which has been raised by learned counsel for the Revenue, which we must decide in favour of the Assessee and that is with regard to an addition of Rs. 1.10 lakhs made by the Assessing Officer being the disclosed income for the years 1990-91 to 1992-93. We have been taken through the assessment order and the conclusion made by the Assessing Officer under Serial No. 7 in paragraph 23 of the order shows that the amount of Rs. 1,10,750/- had already been disclosed by the Assessee in its return of income for the assessment years 1990-91 to 1992-93. Clearly, therefore, there is no error committed by the Tribunal in deleting this amount from the income of the Assessee in the block assessment. To this extent, no substantial question of law arises for our consideration.

28. On all the other issues, as already noted above, we remand the matter back to the Tribunal for reconsideration and expect the Tribunal to state the reasons for coming to its conclusion on the basis of the records available before it.

29. To avoid any confusion, we clarify that the Revenue has raised the following ten substantial questions of law :-

(a) Whether on the facts and in the circumstances of the case, the Tribunal was correct, both on facts and in law, in deleting the addition of Rs. 19,45,000/- made on account of investment in property No. B-222, Okhla, New Delhi?

(b) Whether the learned ITAT was correct in law and on the facts and circumstances of the case in adopting a G.P. Rate of 0.6% as the gross profit ratio in the business of the Assessee?

(c) Whether the learned ITAT was correct in law and o the facts and circumstances of the case in reducing the addition to Rs. 6 lakhs from 45 lakhs as the capital introduced in the benami business units?

(d) Whether the learned ITAT was correct in law and on the facts and circumstances of the case in estimating the turnover from the three benami businesses at Rs. 11.50 crores as against the turnover assesseed by the Assessing Officer at Rs. 14.81 crores on the basis of the documents seized during the search?

(e) Whether the learned ITAT was correct in law and on the facts and circumstances of the case in reducing the income from property No. B-222, Okhla Industrial Estate, from Rs. 8,76,120 to Rs. 2,08,530/- accepting 1/4th share in the property inspite that the learned ITAT declined to go into the question of share of the Assessee in the property?

(f) Whether the learned ITAT was correct in law and on the facts and circumstances of the case in reducing the income from Maruti Draw to the estimated figure of Rs. 50,000/- when the Assessing Officer has given the exact calculation to arrive at the income?

(g) Whether the learned ITAT was correct in law and on the facts and circumstances of the case in directing the Assessing Officer to delete the addition of Rs. 1.10 lakhs being the income for the years 1990-91 to 1992-93 since already declared, when such income was not included in the income assessed as income from undisclosed sources?

(h) Whether the learned ITAT has erred in law and in the facts to ignore/consider the entire document on the basis of which the finding was recorded by the Asseessing Officer?

(i) Whether the order of the learned ITAT is perverse as it has ignored the findings of the Assessing Officer and the evidences on record and on the basis of which the income from undisclosed sources has been assessed?

(j) Whether order passed by the learned ITAT is perverse in facts and in law as the learned ITAT has passed the order on estimates bases on no material evidence or basis to arrive at the estimated figures?

30. Issue (g) is decided in favour of the Assessee. Issues (h), (i) and (j) are general in nature. The Tribunal will, therefore, consider only issues (a) to (f) when it takes up the matter on remand.

31. The parties are directed to appear before the Tribunal on 22nd October, 2007, for directions.

32. The appeal is disposed of accordingly.

Sd./-
MADAN B.LOKUR, J

Sd./-
S. MURALIDHAR, J

SEPTEMBER 21, 2007